

**ZONING BOARD OF APPEALS**  
**CITY OF CINCINNATI, OHIO**

In re:

Appeal from Denial of Application for  
Certificate of Appropriateness for  
Demolition of 716-718 Main Street,  
Dennison Hotel Building, By Columbia  
REI, LLC.

Case No. Z-4019-2016

**RECEIVED**

ZONING BOARD OF APPEALS  
DATE 9.14.14.

**BRIEF OF APPELLANT COLUMBIA REI, LLC**

**I. INTRODUCTION**

But for a single vote, this appeal would not have been necessary. Only three members of the seven-member Historic Conservation Board (“HCB”) voted to deny the Property Owner’s request for a Certificate of Appropriateness (“COA”) to demolish the abandoned Dennison hotel building (the “Dennison”).<sup>1</sup> On appeal, the Cincinnati Zoning Board of Appeals (the “ZBA”) should reverse the HCB’s plurality decision because the Property Owner inarguably met the standards established by the Cincinnati Municipal Code (“CMC”) to be granted a COA by producing credible evidence that it would be economically harmed if the COA was denied.

The Property Owner met the standards established by CMC 1435-09-2, which governs the COA process. Consistent with CMC 1435-09-2, the Property Owner presented credible evidence that even under the Main Street Historic District Guidelines, it meets the criteria for a COA, and that it will suffer economic hardship if the COA is not approved. The Property Owner’s credible evidence, however, was improperly challenged with unsworn, impermissible “testimony” by Cincinnati’s Urban Conservator, Beth Johnson along with her inaccurate, biased staff report. Ms. Johnson made recommendations and statements that were inaccurate and blatantly contrary to established law, which the Property Owner was not permitted to correct on cross-examination. Ms. Johnson’s flawed recommendation led the HCB to deny the COA based on the impermissible consideration of speculative availability of historic tax credits and because the Property Owner did not offer the Dennison for sale. The HCB’s basis for denial is contrary to law. Accordingly, the HCB’s decision should be reversed.

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<sup>1</sup> The HCB Decision was a 3-2 decision with two members recusing themselves.

## **II. FACTUAL BACKGROUND**

### **A. Historical Background of the Dennison Hotel**

The Dennison was built in 1892 as a six-story building for an ironworks company after the previous building on the site was demolished. [May Tr. 18:11-14].<sup>2</sup> The initial ironworks company's use of the building only lasted until 1930, at which time the new owner opened an office furniture company on the first three floors and converted the rest into a hotel – the Main Hotel. [R. 000127]. Although the Dennison is currently located at 716-718 Main Street, the original Dennison Hotel was located at Fifth and Main, but was demolished in 1932. [Id.]. the Main Hotel changed to the New Dennison Hotel at that time. [Id.]. For many years thereafter, the Dennison was a rooming house that was in constant decline. [Id.]. There is no historic event, occurrence, or person associated with the Dennison. [June Tr. 24:3-8]. While Ms. Johnson suggests that the Dennison was built by Samuel Hannaford, there is little evidence to this claim. The Dennison is not included in any of the long lists of Hannaford-designed buildings, including information on samuelhannaford.info, the 1978 City Planning Commission's Cincinnati Historic Inventory, the 1979 City Planning Commission's Thematic Resources of Samuel Hannaford & Sons Report and Analysis, or the National Register of Historic Places inventory nomination form from 1979 title "Samuel Hannaford & Sons Thematic Resources in Hamilton County." [R. 000129-000223]. It is simply an old, dilapidated building.

Most recently, the Dennison operated as a single-room occupancy "hotel" with common bathroom facilities, but no common amenities. [R. 000362]. About five years ago, however, the Dennison ceased operation and has been vacant and unsafe for occupancy ever since. [May Tr. 48:5; 52:15-16; 207:15-17].

### **B. Failed Restoration Attempt by the Cincinnati Center City Development Corporation ("3CDC") and its partner, The Model Group**

Following the long-term vacancy and the Dennison's continued deterioration, 3CDC and its partner, The Model Group, purchased it in 2010. [R. 000247 & 000362]. 3CDC purchased the Dennison with the intention of redeveloping the dilapidated building into apartment units for homeless veterans. [Id.]. 3CDC and The Model Group are two of Cincinnati's most successful and well-known development companies. Both companies have been engaged in the restoration and reuse of old buildings to a greater extent than any other developer in the City, and hoped to accomplish the same restoration with the Dennison. [R. 000362]. The developers engaged a professional team and spent significant money to determine the feasibility, design, and scope of the proposed project. [R. 000247].

3CDC and The Model Group's estimate to redevelop the dilapidated Dennison was approximately \$11 million. [R. 000362]. 3CDC, however, did not restore and reuse the Dennison. [R. 000247]. 3CDC did not secure the necessary financing for the project, and instead sold the property in order to recoup the money it spent in its failed redevelopment attempt. [May Tr. 41:17-25; R. 000247].

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<sup>2</sup> "May Tr." represents citation to the hearing transcript from May 26, 2016, while "June Tr." represents citation to the hearing transcript from June 16, 2016. "R" represents citation to the 548-page bates-numbered record.



### **C. Columbia REI, LLC's purchase of the Dennison and future development plans for the property**

Columbia REI, LLC, and its sole member Columbia Oldsmobile Company, purchased the Dennison from 3CDC in 2013.<sup>3</sup> Columbia REI, LLC and Columbia Oldsmobile Company are affiliates of the Joseph family, which has been involved in downtown Cincinnati real estate for decades. [R. 000125]. The Property Owner has acquired almost the entire block of properties, from Main Street to Sycamore Street, between East 7<sup>th</sup> Street and East 8<sup>th</sup> Street, except for the buildings on the east of main street north of the Dennison. [May Tr. 39:3-7]. Prior to purchasing the Dennison, the structure's dilapidated and blighted condition was impacting the Property Owner's investment in these surrounding properties. [May Tr. 40:4-9]. There were a number of incidents and police runs made to the Dennison, which the Property Owner feared would negatively impact property values and hinder downtown development. [May Tr. 40:4-5].

The Property Owner purchased the Dennison from 3CDC in order to accomplish what 3CDC could not – develop the Dennison property and its surrounding property with an economically viable project. The Property Owner purchased it for approximately \$1,320,000 in 2013 to protect its substantial investment in its adjacent properties. [May Tr. 38:15]. The Dennison is now part of the Property Owner's large assemblage of property that it hopes will be readily available to construct Cincinnati's next major downtown development. [R. 000125]. No other such site currently exists in Cincinnati's downtown core; the assemblage of property by a single owner is now the largest and best site in all of downtown Cincinnati for a major, new development. [R. 000125].

The Property Owner's proposed development would be highly compatible with the recent development in the adjacent Sycamore Street Corridor and would create a significant economic boom to the Central Business District. [R. 000036]. The infusion of cash and significant investment would directly benefit the Main Street Historic District as well as the entire Cincinnati downtown. [R. 000126]. The Property Owner even prepared conceptual drawings of its proposed major commercial development on this site, which were presented to City officials. [R. 000249-000250; May Tr. 63:4-6]. The conceptual drawings are attached hereto as Exhibit A and located at pages 249-250 of the Record. City officials were, of course, supportive of the development because it would attract jobs and investment to the downtown core. [May Tr. 63:12-15].

### **D. Condition of the Dennison**

Unlike the Property Owner's above-discussed plans for what this area could be, the Dennison itself has become barely more than an eyesore. [R. 000126]. Under prior ownership, the structure was left to decay, deteriorate, and become unsafe and unfit for vacancy or use. [Id.]. It has a history of building violation orders against it dating back more than 40 years due to lack of maintenance. [May Tr. 30:21-25]. Its interior condition is fair to poor, and the exterior condition is extremely poor and unsafe to the surrounding public due to its crumbling façade.

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<sup>3</sup> Appellant, Columbia REI, LLC acquired title of the Dennison property on January 4, 2016, from Columbia Oldsmobile Company, an affiliated entity. Columbia Oldsmobile Company acquired title to the Dennison property on August 26, 2013 from CBD Holdings, Inc. for approximately \$1,320,000. [R. 000036].



[May Tr. 142:11-13; R. 000036]. It is physically and functionally obsolete, and as a result, has been uninhabitable and remained vacant for approximately five years. [R. 000036; May Tr. 52:15-16].

There have been no significant interior or exterior improvements made in recent years. [R. 000037]. At the time the Property Owner purchased the Dennison, there was old, combustible items on each of its floors. [May Tr. 207:15-17]. The Dennison still had old carpet, furniture, sheets, towels, and blankets from the last time it was used over five years ago. [May Tr. 207:21-24]. This was particularly troubling since the building also had a defective boiler that needed replacement. [May Tr. 42:15-17]. It even had old food that was still in some of the rooms. [May Tr. 211:5-7]. There were no working elevators, no fire alarm system [May Tr. 208:4-5; 209:7-10], and the floors were water-stained and cracking. [May Tr. 210:22-23]. In fact, the entire building had suffered significant water damage, leading to out-of-level floors and gaps in the floorboards. [R. 000224]. The moisture retained in the walls from water penetration increased the potential for additional rotting as well. [Id.]. The exterior of the building was also unsafe, as there were loose bricks on the exterior façade. [May Tr. 209:13-19]. Needless to say, the Dennison does not comply with the current Cincinnati Building Code. [R. 000104; 000225].

To state the obvious, the Dennison is in extremely poor condition. The Property Owner, however, spent a significant sum of money and time to, at a minimum, address several safety issues and concerns with the Dennison's basic structural integrity. [R. 000037; May Tr. 42-51]. In total, the Property Owner spent over \$1.7 million dollars to acquire the property and make it safe again. For example, the Property Owner spent over \$44,000 on basic maintenance, including \$36,000 just to replace a defective boiler, as well as approximately \$50,000 to remove debris and various fire hazards. [May Tr. 42:15-19; 49:1-12]. All elevator shafts were boarded up and marked for identification. [R. 000037; May Tr. 42-51]. All stairwells and exits were marked. [Id.]. All non-exit doors were marked appropriately. [Id.]. Junk was removed from the building. [Id.]. Exterior safety measures were implemented to protect the general public from falling bricks and debris from the building; scaffolding was installed to ensure falling bricks from the façade would not land on pedestrians using the sidewalk. [May Tr. 211:19-22]. All combustible items of personal property were removed from the building. [R. 000037]. Additionally, the Property Owner retained a consultant to make the formerly-inoperable fire suppression system workable for responding fire departments. [R. 000037].

While some of the safety concerns were addressed, the functional obsolescence of the Dennison remained; simply stated, the building is functionally obsolete. [R. 000057]. The type of living arrangement contemplated by the Dennison – a single-room occupancy hotel with restrooms at the end of the hall – is no longer acceptable in today's society. [Id.]. The Dennison's layout and design is unacceptable for today's market as well. [Id.]. The long and narrow design creates complications with respect to redevelopment and configuration of residential units. [May Tr. 105:13-16]. Current building code standards would not permit a wood-framed building of this size and the lateral load system would not be permitted to be unreinforced masonry. [R. 000104]. The existing elevator shafts are not adequate for installing tenant elevators or a required service elevator. [R. 000106]. Similarly, the existing stairways do not provide adequate clearances for life safety and egress. [Id.]. Retrofitting the structure to



comply with current building code standards, however, would be virtually impossible. [Id.]. In sum, the Dennison's structural and design limitations make it functionally obsolete.

#### **E. The Dennison is Designated as Merely "Compatible"**

The Dennison is not a historic building simply because it is located within a historic district. Instead, a historic district designates various levels of importance for each building within the district. The Dennison is located within the Main Street Historic District, which was created in 1984. [May Tr. 16:10-12]. As there is no historic event, occurrence, or person associated with the Dennison, it is designated as merely "compatible" – not historic – within the Main Street Historic District. The designation of "compatible" is the second-lowest possible designation in a historic district. [R. 000422]. The other designations, in order, are: national register, outstanding, significant, and incompatible. [R. 000422]. Simply stated, the Dennison is not historic. It is not outstanding. It is not significant. It is merely compatible.

### **III. PROCEDURAL HISTORY**

#### **A. Request for Certificate of Appropriateness for Demolition**

Following its purchase of the Dennison property and completion of the above-described, significant safety repair work, the Property Owner filed its request for a COA on February 23, 2016 to demolish the building on the property. Contemporaneous with its application, the Property Owner submitted voluminous material, including reports and/or statements from multiple experts demonstrating by credible evidence that the Property Owner will suffer economic hardship if the COA is not approved, that the Dennison cannot be reused economically, and that no reasonable economic return can be realized from the use of all or part of the structure.

The Property Owner's submission included, but was not limited to, the following documents: a statement of justification [R. 000034]; documentation for the demolition questionnaire and answers [R. 000035-000040]; the Beck Consulting *Economic Feasibility Analysis* and supplemental information authored by MAI real estate appraiser Lance Brown [R. 000041-000102; 000111-000115]; the Advantage Group Engineers analysis authored by Steve Harm, P.E. [R. 000103-000107]; a statement of operating and maintenance expenses [R. 000108]; date of vacancy information for the Main Street Historic District [R. 000116-000123]; the Property Owner's acquisition explanation [R. 000125-000126]; information on the history of the building [R. 000127; 000129-000223]; information regarding the future use of the Dennison property [R. 000128]; HGC Construction cost estimate information [R. 000231-000246]; 3-dimensional images of preliminary proposed development(s) [R. 000249-000251]; and further information about the compelling case for demolition of the Dennison. [R. 000260-000263].

#### **B. The HCB Hearing**

This matter was first set for a hearing on Monday, April 18, 2016, at which time counsel for the Property Owner requested and was granted, without opposition, additional time. The administrative hearing was continued to May 26, 2016. The hearing continued for a second day



on June 16, 2016, which concluded with a plurality vote of three of the seven HCB board members voting to deny the COA. The series of hearings is collectively referred to as the "Hearing."

#### **i. The Property Owner's Evidence and Testimony**

At the Hearing, the Property Owner called seven witnesses to testify on its behalf: Ned R. VanEmon, a certified public accountant and the Chief Financial Officer for the Joseph Organization; Craig Preston of HGC Construction; Brad Rogers of Structural Systems Repair Group ("SSRG"); Lance Brown, MAI, real estate appraiser, consultant, and Executive Vice President of Beck Consulting, Inc.; Steve Harm, Structural Engineer with Advantage Group Engineers; Mark Browning, Architect Principal with PDT Architects; and Sean Donovan, Realtor with Comey & Shepard.

Mr. VanEmon, a certified public accountant, provided insight about the Property Owner's purchase of the Dennison property. He testified that, as stated above, the Property Owner purchased the Dennison because it wanted to protect its investment in the block of properties from Main Street to Sycamore Street, between East 7<sup>th</sup> Street and East 8<sup>th</sup> Street, that it owns. [May Tr. 39:3-7]. Mr. VanEmon explained that the Property Owner retained highly qualified experts and consultants to analyze the building for reuse and development, so that it would not continue blighting the area. [May Tr. 42-43]. The Property Owner carefully chose its experts because each was "the best in the business." [May Tr. 43:7-8]. For example, Mr. VanEmon testified that the Property Owner hired Lance Brown, MAI, because he was accredited with the state receiving the highest appraiser designation available and because of his exceptional knowledge of the downtown Cincinnati market. [May Tr. 43:19-20]. Finally, Mr. VanEmon testified about the Property Owner's discussions with City officials regarding the development of a major commercial skyscraper, which is illustrated in the record at pages 249 and 250, and attached hereto as Exhibit A. [May Tr. 60-61]. Specifically, he testified that City officials were supportive of the development. [May. Tr. 63:4-13].

Next, Craig Preston from HGC Construction and Brad Rogers with SSRG testified about the estimated construction costs to redevelop the Dennison. Mr. Preston testified that he has 36 years of experience in the construction industry, 30 of which specifically relate to estimating construction costs. [May Tr. 77:1-5]. Mr. Rogers and SSRG were directly involved with repairing and stabilizing the façade of the Dennison as well as helping assemble estimates for redevelopment. [May Tr. 77:19-24]. HGC had previously prepared construction estimates for redevelopment of the Dennison by earlier potential developers in 2005, 2009, and 2015. [May Tr. 78:20-21]. Given its intimate knowledge of the structure, the Property Owner retained HGC to update those cost estimates to current 2016 estimates. [May 79:4-6]. HGC's estimated costs for each of the potential uses of the Dennison are summarized and illustrated on the attached Exhibit B and the Appendix attached thereto. Consistent with Mr. Preston's and Mr. Rogers' testimony, the cost estimates for each proposed use are as follows: (1) Boutique hotel – approximately \$9.7 million. [May Tr. 80:4-13]. (2) Market level apartments – approximately \$7.9 million. [May Tr. 81:15-17]. (3) Market level condominiums – approximately \$8.9 million. [May Tr. 83:19]. (4) First floor only retail – approximately \$1,449,000. (5) Standard office building – over \$5 million. [May. Tr. 84:2-85:25].



Next, Lance Brown, MAI, testified about his economic feasibility analysis that specifically analyzed the potential redevelopment of the Dennison [R. 000041-000102; May Tr. 98-140]. Mr. Brown is an MAI appraiser – the highest designation an appraiser can receive – and has completed numerous appraisal reports and economic feasibility analyses. [May Tr. 99:17-100:7]. He testified that he is very knowledgeable about the downtown Cincinnati market, having worked in Cincinnati as an appraiser for the past 30 years, and has appraised multiple properties in the Downtown District. [May Tr. 16-21]. Additionally, Mr. Brown has been retained by and done work for the State of Ohio and the City of Cincinnati on numerous occasions. [May Tr. 100:7-13]. Mr. Brown independently reviewed HGC's construction estimates and confirmed that they appeared reasonable, accurate, and appropriate prior to beginning his feasibility analysis. [May Tr. 99:17-100:7]. Mr. Brown explained that an economic feasibility analysis considers possible alternative uses for a property and considers whether those uses would generate an adequate return or attract significant investment to achieve their redevelopment. [May Tr. 101:12-22]. Mr. Brown considered all possible uses and arrived at five uses that he considered to be reasonable and practical: (1) a boutique hotel; (2) apartments; (3) condominiums; (4) office space; and (5) first floor retail only. [May Tr. 102-103]. These are the most likely and reasonable uses given the physical and legal limitations of the property. [May Tr. 11-14]. Mr. Brown analyzed just about everything about the Dennison – its functional utility, its physical configuration, costs associated with redevelopment, structural integrity, load capacities, etc. [May Tr. 104-105]. Using HGC's reasonable cost estimates, considering all potential uses for the Dennison, and analyzing the costs and returns of the different uses, Mr. Brown determined that all five proposed uses were not economically feasible. Mr. Brown analyzed the required revenue of each use to achieve economic feasibility versus the actual projected revenue of the use. Mr. Brown's analytical findings are summarized and illustrated on Page 2 of the attached Exhibit B. The Appendix to Exhibit B summarizes and illustrates the various costs and expenses, as well as the necessary and expected return, required for the economic feasibility analysis for each proposed use.

Mr. Brown also provided additional detail on the economic feasibility analysis. In doing so, Mr. Brown testified that he did not consider state and federal tax credits because the economic feasibility analysis relies on the intent to attract *private* investment to a project. [May Tr. 112:18-25]. He explained that, government subsidies are not properly part of a market analysis. Notwithstanding the fact that tax credits should not be included in an economic feasibility analysis, Mr. Brown testified to his awareness that 3CDC – a renowned expert in acquiring historic tax credits – did not obtain such credits for the redevelopment of the Dennison. [May Tr. 113:5-18]. Moreover, Mr. Brown also testified regarding his use of an entrepreneurial incentive in the economic feasibility analysis. He explained that an entrepreneurial incentive is the incentive rate that is required to attract investment into a project. [May Tr. 113:23-25]. The expectation is that a developer undertakes a project for purposes of making a profit, and if the incentive rate is too low, there will not be any investment into the project. [May Tr. 114:6-16]. Ultimately, Mr. Brown testified that, based on his expertise, training, knowledge of the building, and knowledge of the downtown Cincinnati market, there is no economically feasible use for the building. [May Tr. 116:19-117:4].



Steven Harm with Advantage Group Engineers testified next for the Property Owner. Mr. Harm has extensive experience with redevelopment of historic buildings, including being the engineer of record for the Rhinegeist Brewery and the St. George church project. [May Tr. 141:10-25]. In addition to his testimony, Mr. Harm prepared an expert report regarding the condition of the Dennison. [R. 000103-000107]. Mr. Harm noted that the Dennison's exterior was in poor condition, with particular concern over the deteriorated façade that was a hazard to the public because of falling brick. [R. 000104]. Like Mr. Brown, Mr. Harm testified that the cost to completely retrofit the Dennison for non-residential use would be impractical, if not impossible. [R. 000104]. Mr. Harm also noted several major, costly structural items that would need to be reconstructed for *any* potential redevelopment. [Id.]. In addition to the major structural problems, including the crumbling façade, Mr. Harm testified that he observed several areas that sustained extensive water damage, which lead to unlevel floors and gaps in the floorboards. [May Tr. 150:3-9; R. 000224].

Next, Mark Browning with PDT Architects testified for the Property Owner. Mr. Browning confirmed what many of the other expert witnesses stated – “the only conclusion is there is not currently an economically feasible development option for the Dennison.” [R. 000254]. Mr. Browning based his conclusion on a number of factors, including, but not limited to, the geometry of the building, the dimensions and layout of the Dennison, the lack of onsite parking, the lack of large windows, the existing conditions of the interior and exterior structure, and the high cost of development. [R. 000253-000254].

Finally, Sean Donovan, a realtor affiliated with Comey & Shepherd testified for the Property Owner. Mr. Donovan testified about his recent involvement with the Dennison, which included coordinating with the City's building department, police department, and elevator inspectors to ensure that the Dennison was compliant with City codes and maintained in a safe manner. [May Tr. 206:18-23]. Mr. Donovan worked with the fire department to ensure fire safety measures were implemented, including the removal of combustible material, and maintenance of the boiler and fire suppression system. [May Tr. 208-209].

## **ii. The Opposition's Evidence and Testimony**

The Cincinnati Preservation Collective/Cincinnati Preservation Association submitted material and presented witnesses to testify in opposition of the Property Owner's COA request. The opposition's rebuttal material included construction cost estimates from TAMZ Restoration and Construction, a historic preservation tax credit analysis for apartments, an operating pro forma and expenses analysis for apartments, and letters in opposition of the Property Owner's request. The opposition later supplemented its rebuttal documents to include a form petition presumably signed by individuals opposed to the COA, but provided little to no information about those individuals. [R. 000386-000394]. At the hearing, only four witnesses testified for the opposition: John Blatchford, Joe Brashear, Kathleen Norris, and Jason Snyder. None of these witnesses prepared a comprehensive and complete economic feasibility analysis, nor are any of them licensed real estate appraisers.

At least three of the witnesses' testimony ultimately supported the Property Owner's position. Ms. Norris testified that a boutique hotel, office space, first floor retail only, and



condominiums are not feasible uses for the Dennison. [June Tr. 94:22-95:3]. She only believed that apartments were appropriate, but did not provide any economic analysis in support of this position. [June Tr. 95:4-7]. Similarly, Jason Snyder testified that HGC's reputation is "very, very good." [June Tr. 104:22]. He also testified that HGC does a very accurate job in estimating costs. [June Tr. 104:25-105:2]. Mr. Snyder also conceded that TAMZ's cost estimates are *not* more accurate than HGC's construction numbers, and that the only difference between the two companies is that TAMZ is a smaller business that offers cheaper construction. [June Tr. 105:3-14]. Mr. Snyder also testified that his former employer, Coon Restoration, had costs estimates "in line with HGC's." [June Tr. 106:18-19]. Mr. Snyder conceded that he did not conduct an asbestos analysis, nor did he ever enter the Dennison. [June Tr. 105:23-106:6; 110:17-19]. Finally, on cross-examination, Mr. Blatchford conceded that state historic tax credits are not guaranteed and that without such credits, the Dennison redevelopment would not be viable. [June Tr. 60:18-20; 64:6-10].

### iii. The Presentation and Report by Urban Conservator Beth Johnson

From the very beginning of the process, Ms. Johnson was opposed to the Property Owner's request for a COA to demolish the Dennison. Ms. Johnson's staff report and Hearing presentation recommended denial of the Property Owner's COA. The City took the position, over the objection of the Property Owner's attorneys on the record, that the staff report and presentation by Ms. Johnson are *not* evidence. Based on the City's position, Ms. Johnson's presentation was not under oath and she was not subject to cross-examination. Counsel for the Property Owner objected on the record to the failure to place Ms. Johnson under oath or allow her to be cross-examined.

Ms. Johnson's staff report and presentation contained factual inaccuracies and misstatements of law. These factual inaccuracies would have been corrected for the record had Ms. Johnson been available for cross-examination. Examples of Ms. Johnson's misstatements and omissions include, but are not limited to, the following:

- The agenda described this matter as "a request for the demolition of a contributing building in the Main Street Historic District." That statement contained at least two factual errors. First, the matter is an application for a Certificate of Appropriateness. Second, 716-718 Main Street is not a "contributing building" in the Main Street Historic District. It has never been determined to be a contributing building; it is only "compatible." [R. 000001].
- Ms. Johnson stated "the applicants did not provide any analysis for use of part of the building." [R. 000014]. Lance Brown, however, did analyze precisely that, which can be found on pages 67, 68, and 75 of the Record. The analysis for use of part of the building is documented on page 85 of the Record, and through the statement by Kathleen Norris of Urban Fast Forward, who was identified as one of the opponents' witnesses, occurring at page 458 of the Record. With respect to the partial use of the Dennison, Ms. Norris stated that "[t]his is a non-option option.... *As Beck's Consulting Analysis shows, it is financially unfeasible.*" (Emphasis provided by Ms. Norris.)



- Ms. Johnson stated that the Dennison was built by Samuel Hannaford [May Tr. 18:11-14]; however, the long lists of Hannaford-designed buildings do not include the Dennison as a Hannaford-designed or constructed building. [R. 000129-000223].
- Ms. Johnson stated that “[c]onsidering the use of economic incentive and/or funding available is a -- is a required factor in the economic hardship test as established by the City of Cincinnati Zoning Code. If a rehabilitation project can work with available incentives, it cannot be deemed economically infeasible[.]” [May Tr. 25:19-26:1]. However, as discussed below, the law does not state that. The consideration of economic incentives and available funding is only a discretionary subfactor of the economic hardship analysis that the HCB “may consider.” See Section 1435-09-2(b)(iii). It is not required. She also failed to state the fact that such funding is not guaranteed.
- Ms. Johnson stated that “[t]he owner has not attempted to sell or lease the property and, therefore, cannot claim an economic hardship, as they have not proven that the property could not be sold or utilized to another buyer or tenant for a viable use.” [May Tr. 23:21-24:1]. Once again, the law does not state this. Just like the consideration of available economic incentives, considering any listing of the property for sale is a discretionary subfactor in the economic hardship analysis that the HCB “may consider.” See Section 1435-09-2(b)(iii)(bb). It is not required and does not disqualify the Property Owner from demonstrating economic hardship.

### **C. Denial of COA by a Plurality – Not Majority – of the HCB**

Following the Property Owner’s presentation of credible evidence, Ms. Johnson’s inaccurate report, and sparse opposition testimony, a mere plurality (three members) of the seven-member HCB voted to deny the Property Owner’s request for a COA by the slimmest of margins. The plurality stated that the application “does not substantially conform to the Main Street Historic Guidelines” because there was some indication that it may be possible to reuse the Dennison for residential use. To that end, the plurality concluded that the Property Owner did not demonstrate “to the satisfaction of the Board” that the Dennison could not be reused for a reasonable economic return, though the plurality Decision did not discuss the reasonable economic return that could be gained.

The plurality also concluded that the Property Owner failed to demonstrate “by the *preponderance of the credible evidence*” that it will suffer economic hardship if the COA is not approved. [R. 000547]. The plurality based its conclusion solely on two allegations: (1) that the Property Owner did not consider the use of speculative tax credits; and (2) because the Property Owner did not offer its property for sale. With respect to the tax credit issue, the plurality conceded that such incentives are speculative at best, but chose to ignore the fact in arriving at its Decision. [R. 000546] (“Notwithstanding the speculation associated with state and federal tax credit financing . . .”). With respect to the attempt to force the sale of the Dennison property, the plurality stated that it was “not persuaded” that the Property Owner will suffer economic hardship “because it has not offered the property for sale. Furthermore, the plurality stated that



the Property Owner “failed to demonstrate that it will suffer economic hardship . . . because it has not attempted to recoup its investment in the Property by listing it for sale.” On these grounds, the plurality voted to deny the COA by the slimmest of margins.

#### IV. STANDARD OF REVIEW

The standard of review for a COA application is simple – did the property owner provide credible evidence to meet the CMC? CMC 1435-09-2 mandates that the HCB approve a COA when it finds either (a) that the property owner demonstrates *by credible evidence* that the proposal substantially conforms to the applicable conservation guidelines; *or* (b) that the property owner demonstrates *by credible evidence* that it will suffer economic hardship if the COA is not approved. The HCB, however, applied an incorrect legal standard, which inevitably led to an erroneous decision. In its Decision, the HCB concluded that:

The Owner has not demonstrated *to the satisfaction of the Board* that the structure cannot be reused nor can a reasonable economic return be gained from the use of all or part of the building proposed for demolition; and, the Owner has not demonstrated *by the preponderance of the credible evidence* that it will suffer economic hardship . . . (Emphasis added.) [R. 000547].

It is quite apparent on the face of the Decision that the HCB used an improper legal standard. Neither the HCB’s “satisfaction” nor a “*preponderance* of the credible evidence” is the legal standard required by the CMC.<sup>4</sup> The Property Owner simply needs to demonstrate *credible evidence* that *either* the proposal substantially conforms to the applicable conservation guidelines *or* that the property owner will suffer economic hardship if the COA is not approved. The City of Cincinnati has demonstrated that when it intends to require a different legal standard in a proceeding, such as “preponderance of evidence,” that standard is explicit. Indeed, at least ten sections in the CMC apply a “preponderance of evidence” standard. *See* CMC Sections 311-9-D2; 311-59; 502-19.1; 515-7; 759-7; 761-14; 871-9; 899-17; 1101-69; 1449-17. Section 1435-09-2 is not one of them.

#### V. LEGAL ARGUMENT

The ZBA should reverse the HCB’s Decision because the Property Owner presented credible evidence that it is entitled to a COA to demolish the Dennison. First, as explained below, the Property Owner complied with CMC 1435-09-2 as it pertains to the demolition of non-contributing buildings in historic districts. Second, the HCB impermissibly relied upon unsworn statements of the Urban Conservator to support its denial. Third, the HCB impermissibly considered speculative tax credit availability to deny the COA. And fourth, the HCB impermissibly considered the fact that the Property Owner did not offer the property for sale as grounds to deny the COA. Each issue is discussed individually below.

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<sup>4</sup> Although the Main Street Historic District Guidelines uses the phrase “to the satisfaction of the Historic Conservation Board,” the HCB’s “satisfaction” must be dependent on whether the applicant presented credible evidence, pursuant to Section 1435-09-2 of the CMC.



**A. The Property Owner must be granted a COA to demolish the Dennison because it met the standards established by CMC 1435-09-2.**

CMC 1435-09-2 provides the standards the HCB considers in evaluating a request for a COA to demolish a historic building. CMC 1435-09-2 provides in pertinent part that:

The Board may approve or approve with conditions an application for a Certificate of Appropriateness when it finds either:

- (a) That the property owner has demonstrated by credible evidence that the proposal substantially conforms to the applicable conservation guidelines; or
- (b) That the property owner has demonstrated by credible evidence that the property owner will suffer economic hardship if the certificate of appropriateness is not approved.

The gravamen of the analysis comes down to three simple inquiries: (1) Did the Property Owner present credible evidence that its proposal substantially complies with the historic district guidelines? (2) Did the Property Owner presented credible evidence that it will suffer economic hardship if the COA is denied? Or (3) did the Property Owner present credible evidence that there is no economically feasible use of the property if the COA is denied. The Property Owner's COA must be approved if it meets any one of these standards. As discussed in the three subsections below, the Property Owner presented credible evidence for all three.

**i. *The Property Owner's proposal substantially complies with the Main Street Historic District Guidelines.***

The Property Owner presented credible evidence that its proposal to demolish the Dennison substantially conforms to the Main Street Historic District Guidelines (the "*Guidelines*"). The *Guidelines* "are not rigid sets of rules, but rather a guide on how to make improvements in the district which are compatible with its character." See *Conservation Guidelines: Main Street Historic District Guidelines*. The *Guidelines* set broad parameters, but "do **not** require that an owner make improvements" and "do **not** force an owner to 'take the property back to the way it was.'" (Emphasis added.) *Id.* In fact, the *Guidelines*, "and the legislation which set up the [HCB], **are geared toward negotiating solutions which will give the owner substantial benefit**[" (Emphasis added.) *Id.* The non-rigid nature of the *Guidelines*, which are geared toward solutions that provide substantial benefit to private property owners, encourage reasonable development. Accordingly, the Property Owner's proposal to demolish the Dennison and significantly improve the district substantially conforms to the *Guidelines*. Moreover, the *Guidelines* do not prohibit demolition, but explicitly allow for it.

Again, the Dennison is only a compatible building in the Main Street Historic District that remains vacant and blighted. The building has been barely more than an eyesore since its use as transient housing was abandoned approximately five years ago. There is no historic event, occurrence, or person associated with the Dennison. It is simply an old, dilapidated building that



is preventing development that would substantially benefit downtown Cincinnati and more importantly, the Main Street Historic District. To that end, the Property Owner previously prepared a concept plan for a commercial office development for the entire block, which encompassed the Dennison property. [R. 000249-000250]. While the proposal provided in the Record on pages 249 and 250, and attached hereto as Exhibit A, is not set in stone, the Property Owner remains ready, willing, and able to discuss the development of this block with all interested parties. In fact, this concept plan was proposed to and discussed with City officials. [May Tr. 63:4-15]. Those City officials were strongly supportive of the proposal, and but for a single vote in a plurality decision by the HCB, those development discussions would have continued. The officials' support of the development should be obvious – the development would attract hundreds of jobs and significant investment to the downtown core and to the Main Street Historic District. More significantly, it would replace an old, dilapidated building that has plagued the area since its abandonment approximately five years ago. The Property Owner's evidence and testimony overwhelmingly demonstrate that its proposal to develop the Dennison and surrounding properties substantially conforms with the Guidelines, which are geared toward development, not taking the property back "to the way it was." Accordingly, the HCB's Decision must be reversed on this point alone.

**ii. *The Property Owner will suffer economic hardship if the COA is denied.***

There is no question that the Property Owner has suffered economic hardship since it acquired the property. Numbers do not lie. Without the COA, the Property Owner is left with a dilapidated and deteriorating building that cannot be reused in any economically feasible manner.

Indeed, the Property Owner's dilemma with the impossibility of reusing a dilapidated building is starkly similar to the situation in *Diocese of Toledo v. Toledo City-Lucas Cty. Plan Com'ns*, 6th Dist. Lucas No. L-98-1150, 1999 WL 128563 (Mar. 12, 1999). In *Diocese* the Court considered whether to grant a COA for demolition of a structure based on a "reasonable economic return" analysis. Although Ohio law does not specifically define "reasonable economic return" or "economic hardship," the inquiry and analysis – particularly in this case – are fact-specific. The court in *Diocese* held that the property owner was entitled to a COA because the structure could not achieve a reasonable economic return. The decision was based on the fact that there was "widespread water damage to hardwood flooring" and "water seepage through the foundation and resultant brick deterioration." *Id.* at \*2. The court also noted that cost of acquiring, maintaining, and repairing the dilapidated building would provide no reasonable economic return to the owner, thereby creating an economic hardship. *Id.* at \*9.

Similarly, the Property Owner here incurred over \$1.7 million in combined acquisition and carrying costs since its purchase, while receiving absolutely no income. [May Tr. 48:4]. Page 1 of Exhibit B summarizes and illustrates the upfront acquisition costs associated with the Dennison, as well as the continuing annual carrying costs associated with its maintenance and ownership. The breakdown of annual carrying costs is telling. Year-in and year-out the Property Owner will continue to incur utility expenses, maintenance expenses, insurance premiums, real estate taxes, and other miscellaneous costs. [May. Tr. 48]. It will continue to spend hundreds of



thousands of dollars for zero income in return. This is precisely the type of economic hardship a COA was meant to relieve.

In addition to the standard monthly expenses required just to maintain the Dennison, “there are a number of structural engineering issues.” [R. 000224]. The Dennison has severe water damage, the floors are out of level, and there are gaps in the floorboards. [Id.]. Due to the age and condition of the Dennison, the cost to completely retrofit it for use would be virtually impossible. [R. 000104]. Moreover, the Dennison’s exterior is in such poor condition that multiple safety measures, including erecting scaffolding and netting, had to be put in place to protect against any potential hazard to life safety from falling brick. [R. 000104].

Additionally, the crumbling building is negatively impacting the Property Owner’s surrounding properties thereby creating additional economic hardship. The Dennison is part of the Property Owner’s large assemblage of real estate. The Property Owner now owns nearly the entire block of properties, from Main Street to Sycamore Street, between East 7<sup>th</sup> Street and East 8<sup>th</sup> Street. The Property Owner purchased the Dennison specifically to protect its substantial investment in its adjacent properties. The longer the Dennison remains vacant and this site undeveloped, the longer the rest of the Property Owner’s properties will continue to be negatively impacted. The Dennison would continue to be an eyesore if left in its abandoned state, ultimately affecting values of the surrounding properties.

The present matter is on point with the decision in *Diocese*. In both cases, the structure at issue was in such disrepair, and required maintenance and repair that were so costly, that no reasonable economic return could be gained from their use. Accordingly, the Property Owner demonstrated by credible evidence that the Dennison cannot be economically reused nor can a reasonable economic return be gained from it. The COA should have been granted.

**iii. *There is no economically feasible use of the property without approval of the COA.***

The Property Owner presented credible evidence that there is no economically feasible use for the property without approval of the COA. Although not defined in the CMC, *The Appraisal of Real Estate*, 14<sup>th</sup> Edition, establishes the following standard to determine economic feasibility:

For any of these options to be financially feasible, the change must add at least as much value to the property as it costs. In other words, the value after conversion, renovation, or alternation less the costs of the modification must be greater than or equal to the value of the property as is. The costs involved in any form of modification can include an estimate of profit or entrepreneurial profit. [R. 000058-000059], citing Appraisal Institute; *The Appraisal of Real Estate*; 14<sup>th</sup> Ed; Chicago; 2013; pg. 346-347.

Stated more plainly, any potential reuse or redevelopment of the Dennison must return a profit based on the estimated costs required to construct it. The cost analysis includes actual costs as



well as an estimate of entrepreneurial profit. If the expected economic return does not exceed the cost, then the use is, by definition, not economically feasible.

With respect to the economic feasibility analysis, it is important to note that Ohio courts have held that administrative hearings are “[l]egal matters,” and “are determined by facts, *not belief or desires*.” (Emphasis added.) *Copley Twp. Bd. of Trustees v. Lorenzetti*, 146 Ohio App.3d 450, 2001-Ohio-1662, 766 N.E.2d 1022, ¶22 citing *Libis v. Akron Board of Zoning Appeals*, 33 Ohio App.3d 94, 100, 292 N.E.2d 642 (9th Dist.1972). It is of equal importance to note the legal standard for the HCB as well. The HCB’s review is very simple – did *the Property Owner* demonstrate that it met the CMC standards by *credible evidence*. The COA Hearing is not a battle of opinions or a battle of experts; it is simply whether the Property Owner presented *credible evidence*.

To that end, the Property Owner presented voluminous and concrete facts, including, but not limited to, acquisition costs, maintenance costs, construction costs, and market revenue data. The Property Owner retained experts, who prepared reports and testified at the Hearing, to analyze these facts to determine the economic feasibility of the reuse of the Dennison. In particular, Mr. Brown analyzed the economically feasible uses for the property and the potential economic return from the reuse or redevelopment of all or part of the Dennison. Mr. Brown holds an MAI appraiser designation, which is the highest attainable designation for real estate appraisers, has completed numerous appraisal reports and economic feasibility analyses, and has worked for the State of Ohio and City of Cincinnati in that capacity on many occasions. [May Tr. 99:20-100:13]. Mr. Brown’s qualifications are uncontroverted. [R. 000100-000101]. Mr. Brown prepared a comprehensive and complete economic feasibility analysis, following the standards outlines in *The Appraisal of Real Estate*, and testified about the same. [R. 000041 – 000102]. In fact, Mr. Brown’s economic feasibility analysis was the *only* comprehensive and complete feasible analysis presented to the HCB.

Again, Mr. Brown analyzed the five most likely and most probable uses for the property: (1) a boutique hotel; (2) market level residential apartments; (3) market level residential condominiums; (4) market office space with first floor retail; and (5) first floor retail. *See Beck Consulting, Inc. Feasibility Analysis* [R. 000042-000102]. Mr. Brown, in his expert opinion, determined that none of the five possible uses for the property is economically feasible. [R. 000043; May Tr. 116:19-117:4]. Mr. Brown’s expertise and analysis is so compelling that even Kathleen Norris of Urban Fast Forward, a witness who testified in opposition to the COA, conceded that all of these potential uses, with the exception, in her opinion, of market level residential apartments, were not economically feasible. [June Tr. 94:22-95:14].

Notwithstanding the opposition’s concession that four of the five potential uses are not economically feasible, the Property Owner independently demonstrated by credible evidence – which is the legal standard for a COA – that there is no economically feasible use without approval of the COA. The economic infeasibility of each proposed use is illustrated in the bar graphs on Page 2 of Exhibit B, which compares the required revenue to achieve economic feasibility to the projected revenue for each use. The graphs and the numbers do not lie. The required revenue to achieve economic feasibility for each of these potential uses is vastly greater than the projected revenue. The Property Owner would actually *lose* money if it attempted to



develop the Dennison into one of these uses. Simply stated, more money would be put into the property than it would be worth, which unequivocally demonstrates there is no economically feasible use for the property. See *Diocese of Toledo*, at \*9.

In stark contrast to the Property Owner's factual and analytical presentation of evidence and testimony, the opposition relied on lay opinions and beliefs to oppose the COA request. The opposition presented testimony from Kathleen Norris in an attempt to challenge Mr. Brown on his facts and analysis. The problem, however, is that Ms. Norris is not a real estate appraiser, she did not present facts, and her opinions were empty and not supported by any reliable facts or credible evidence whatsoever. In fact, Ms. Norris stated that she agreed with Mr. Brown's analysis generally, but disagreed with one aspect of his financial analysis – "They have indicated that we cannot achieve the necessary level of income. And I believe we can." [June Tr. 88:6-8]. Ms. Norris's unsupported "beliefs" are not credible evidence.

Ironically, Ms. Norris's testimony actually proved the Property Owner's point – she indicated that the "first phase of The Banks is now renting as high as \$2.40 a square foot." [June Tr. 89:7-8]. Even assuming the Dennison apartments could achieve that rate, it still does not clear the financial hurdle of \$2.51 per square foot to make an apartment use economically feasible. Even when Ms. Norris was pressed to opine on what she believed the market rent for apartments could achieve at this location, she could not answer:

Q: But, Ms. Norris, that's The Banks. This is not The Banks. What do you -- what market rate do you think apartments in the Dennison Hotel could bear?

A: I think that there are many people who would like to live downtown who think that the fact that this is not The Banks will be an asset rather than a detriment. The Banks is a lovely location, but it's very lively. It's very noisy. It's very crowded on game days. They may be those who want downtown living at a slightly slower pace.

[June Tr. 89:13-90:1].

Ms. Norris could not support her beliefs with facts or economic analyses. Ms. Norris's wishful thinking and desired outcomes do not equate to credible or reliable evidence. Her disagreement with Mr. Brown's economic feasibility analysis is nothing more than an unsupported opinion that cannot be accepted as evidence, let alone credible evidence. On the other hand, Mr. Brown presented credible evidence, supported by facts and analysis, that the reuse of the Property for market level apartments is not economically feasible.

In addition to Ms. Norris's failed opinion testimony, the opposition attempted to introduce irrelevant and faulty testimony about alternative construction costs. The opposition's introduction of TAMZ Construction's cost estimates, however, is irrelevant and unsupported. As previously noted, the legal standard for the HCB to consider is not whether one construction estimate is more credible than the other; the legal standard is much simpler – did *the Property Owner* demonstrate by *credible evidence* that HGC's construction estimates were credible. The answer is yes, and Jason Snyder of TAMZ Construction agrees. On cross-examination, Mr.



Snyder, a project manager for TAMZ Construction, testified that HGC's reputation is "very, very good." [June Tr. 104:22]. He also testified that HGC does a very accurate job in estimating costs. [June Tr. 104:25-105:2]. Mr. Snyder also conceded that TAMZ's cost estimates are *not* more accurate than HGC's construction numbers, and that the only difference between the two companies is that TAMZ is a smaller business that maintains costs at a lower level. [June Tr. 105:3-14]. In fact, Mr. Snyder testified that his former employer, Coon Restoration, had costs estimates "in line with HGC's." [June Tr. 106:18-19]. Finally, Mr. Snyder conceded that he did not conduct an asbestos analysis, nor did he ever enter the Dennison. [June Tr. 105:23-106:6; 110:17-19]. This is in stark contrast to HGC's familiarity and knowledge of the building and its conditions, since it has been evaluating the Dennison for years. [June Tr. 110:6-9].

Notwithstanding the fact that neither Ms. Norris's unsupported desires and beliefs nor Mr. Snyder's alternative cost estimate are relevant to the HCB's legal determination, their testimony actually supported the Property Owner's position. Ms. Norris conceded that all but one of the uses were not economically feasible, while offering no financial analysis whatsoever to support an apartment use. Similarly, Mr. Snyder conceded that HGC is a highly reputable construction company that accurately estimates construction costs. The bottom line is, the Property Owner presented credible, factually-supported evidence that there is no economically feasible use of the property without a COA for demolition. The HCB's Decision to deny the COA is based on a flawed legal standard and therefore must be reversed.

**B. The unsworn testimony of Urban Conservator Beth Johnson was impermissibly considered as evidence by the HCB; it should be disregarded.**

From the very beginning of the process, Ms. Johnson made her opposition to the demolition clear. She never gave the Property Owner a remotely fair opportunity to demonstrate that it met the standards to be granted a COA for demolition. With that background, it was naturally expected that Ms. Johnson's staff report and testimony would be completely against the Property Owner's request. What the Property Owner did not expect, however, is a report and presentation by Ms. Johnson that was replete with misrepresentations, factual and legal inaccuracies, and an unfairly prejudicial tone toward the Property Owner. To make matters worse, the City took the position that Ms. Johnson's report and presentation were neither evidence nor testimony and refused to make her available for cross-examination even after the Property Owner's objection. Ms. Johnson's report, presentation, and her unavailability for cross examination raise *significant* due process issues.

It is well-established in Ohio that where the transcript of evidence from an administrative hearing contains both sworn and unsworn testimony, and where there was an objection to the unsworn testimony, only the sworn testimony may be considered. *Zurow v. City of Cleveland*, 61 Ohio App. 2d 14, 22-23, 399 N.E.2d 92, 98 (8th Dist.1978); see also *Arcaro Bros. Builders v. Zoning Bd. of Appeals, City of N. Coll. Hill*, 7 Ohio St. 2d 32, 218 N.E.2d 179 (1966) ("Where a party demands that witnesses be sworn, or objects to unsworn testimony, and the administrative agency proceeds to hear unsworn testimony, such testimony is not evidence upon which a decision may be made."). It is equally well-established in *Zurow* that any decision of an administrative agency based on unsworn testimony *may not be affirmed* since the decision would not be based on reliable, probative, and substantial evidence. (Emphasis added.) *Id.* In the



present matter, the transcript contains an unsworn presentation by Ms. Johnson, over the objection of the Property Owner's attorneys, as well as a corresponding unsworn report, upon which the HCB obviously relied in rendering its Decision. [May Tr. 14:10-11; 15:14-15]. Ohio law is clear, and based on this point alone, the ZBA must reverse the HCB's Decision.

Notwithstanding this clear violation of Ohio law, Ms. Johnson's misrepresentations of the facts and law, without opportunity for clarification on cross-examination, unfairly prejudiced the Property Owner. The examples of Ms. Johnson's unsupported misrepresentations are numerous. For example, and as stated above, Ms. Johnson unilaterally declared the Dennison to be a "contributing building" when it was established by credible testimony that the Dennison was merely "compatible," not "contributing." Ms. Johnson stated that the Dennison was built by Samuel Hannaford [May Tr. 18:11-14]; however, her statement was mere speculation as there is no evidence to corroborate it. [May Tr. 36:13-17; 214:3-18]. Ms. Johnson reported that "the roof appears to be in sound condition from a visual inspection by the Urban Conservator." Upon cross-examination, it would have been established that her visual inspection of the roof was sticking her head through the access to the roof. She did not conduct any other inspection of the roof and simply reported "no visible roof leaks." Even more troubling is that she completely ignored the uncontradicted statements from Advantage Group Engineers regarding water damage. For example, at page 224 of the Record, Advantage reports that "there are a number of structural engineering issues. The building has suffered a lot of water damage. We have observed settlement distress over '1 ½ to 1'. The floors are out of level throughout the building. There are also gaps in the floorboards. The precise condition of the wooden floor joists is unknown."

As egregious as the factual misrepresentations may be, Ms. Johnson's misstatements of the law may be worse. Ms. Johnson misconstrued two discretionary, nonessential subfactors – the consideration of economic incentives and the consideration of any listing of the property for sale or lease – to be requirements that must be met to establish economic hardship. Those issues are discussed in detail below. The combination of blatant factual misrepresentations and misstatements of the law led to the HCB's flawed Decision. Indeed, the HCB relied upon Ms. Johnson's misstatements of fact and law, in almost verbatim form, to rubber-stamp her recommendation and impermissibly deny the COA. Thus, the HCB's Decision cannot stand.

### **C. The HCB erred by considering speculative tax credit availability and using such speculation as justification for denial of the COA.**

In evaluating economic hardship, the HCB "*may consider*" "economic incentives and/or funding available to the application through federal, state, city, or private programs." CMC 1435-09-2(b)(iii)(ff). Ms. Johnson, however, incorrectly stated that "[c]onsidering the use of economic incentive and/or funding available is a – is a required fact in the economic hardship test as established by the City of Cincinnati zoning code." [May. Tr. 25:19-23]. Not only is this statement patently untrue, but it was also used to justify the HCB's denial. The consideration of economic incentives and available funding is only a discretionary, nonessential subfactor of the economic hardship analysis that the HCB "*may consider*." (Emphasis added.) See Section 1435-09-2(b)(iii). Indeed, the nonessential subfactor is neither a strict requirement nor absolutely determinative of whether the Property Owner will suffer economic hardship. It is simply a



subfactor of the economic hardship analysis that the HCB “*may consider.*” (Emphasis added.) The HCB’s substantial reliance on this nonessential subfactor to deny the COA, at the unlawful direction of Ms. Johnson, is erroneous.

Contrary to Ms. Johnson’s incorrect interpretation of the law, the correct analysis of a project for economic feasibility relies on the intent to attract private investment into a project. In other words, the speculative consideration of available government incentives creates a condition wherein *any* project can become feasible. [May Tr. 112:18-25]. The availability of public funding such as tax credits is completely uncertain, however. In fact, the prior property owner and developer, 3CDC, was unable to secure the proper public funding to advance its development. 3CDC and The Model Group, which are considered experts in securing necessary public financing for rehabilitation projects, were not able to secure state tax credits. Yet, the HCB wants to force the Property Owner to engage in a futile effort to obtain the exact thing the prior owner could not. The law, however, “does not require the doing of a vain thing.” *Beitler v. Sullivan*, 9th Dist. Lorain No. C.A. No. 2295, 1975 WL 180670, \*2 (Aug. 6, 1975) citing *Ohio Edison Co. v. Gantz*, 109 Ohio App. 127, 159 N.E.2d 478 (2nd Dist.1958). The HCB cannot force the Property Owner to spend time and money engaging in futile efforts to obtain uncertain state historic tax credits under these circumstances.

The uncertainty and futility of attempting to obtain state incentives were put on display very recently. Just last month, one of Cincinnati’s most iconic historic buildings, Union Terminal, was unable to secure Ohio Historic Preservation Tax Credits that it was counting on as part of its financing plan to repair the 83-year old building. Notably, unlike the merely “compatible” Dennison building, Union Terminal was listed on the National Register of Historic Places and designated a National Historic Landmark in 1977. Frankly, it is absurd that the HCB has misread the law to require the Dennison to obtain state incentives when nationally-registered historic landmarks are unable to do the same. Indeed, the state historic tax credit process are highly competitive and anything but certain.

The uncertainty and futility apply equally to the availability of federal historic tax credits as well. There is no evidence in the record to suggest that the Dennison and the Property Owner would unequivocally qualify for federal historic tax credits. Just like state historic tax credits, there is an application process; there is no “automatic qualification.” Notwithstanding the uncertainty of qualifying for the credits, federal historic tax credits only offer a *maximum* back-end tax credit of 20% of qualified rehabilitation expenses (“QRE”) only. Additionally, even if the Property Owner were to qualify for any credit, it would be subject to a five-year mandatory compliance period in which any credit could be recapture.

Importantly, the back-end nature of the tax credit cannot be monetized to pay for front-end costs and expenses or other non-qualifying expenses. To that end, the Property Owner would not be able to attract private investment due to the uncertainty of the credit *even if it qualified for the credit in the first place, which is uncertain in and of itself*. Moreover, the Property Owner – Columbia REI LLC, a limited liability company organized under the laws of Ohio – may be disqualified from using any potential federal tax credits unless it restructures its organization, which requires additional time, money, and resources, and creates additional uncertainty. Finally, even assuming the Property Owner qualifies for the credit, and assuming



none of the credit is recaptured after five years, and assuming the Property Owner restructures its organization and can actually use the credit, the credit does not necessarily make an otherwise economically infeasible project all of a sudden feasible. Paul Muller, Executive Director of the Cincinnati Preservation Association, conceded this very point. [June Tr. 44:3-9].

Ultimately, both the opposition's witnesses and the HCB concede that potential historic tax credits are speculative. [June Tr. 61:15-20; R. 000546]. In this context, it is important to reiterate the fact that administrative hearings are legal matters; administrative decisions must be grounded in supported facts, not speculation or desire. *See supra Lorenzetti*, 2001-Ohio-1662, ¶22. Notwithstanding the fact that the prior property owner already established that this project could not receive state historic tax credits, or that a nationally-registered historic landmarks are unable to secure funding, unfounded speculation is not fact and cannot be the basis of an administrative decision. Unfortunately, the HCB used this misreading of the law to deny the Property Owner the COA. Therefore, the HCB erred by considering speculative tax credits in an economic analysis and using such speculation as justification for denial. The Decision must be reversed.

**D. The HCB erred in denying the COA based on the fact that the Property Owner has not offered the property for sale.**

The HCB's other justification for denying the COA, as copied verbatim from Ms. Johnson's recommendation, is that the Property Owner "has not offered the Property for sale." [R. 000547]. In her unsworn presentation, Ms. Johnson explicitly stated to the HCB that "[t]he owner has not attempted to sell or lease the property and, therefore, cannot claim an economic hardship, as they have not proven that the property could not be sold or utilized to another buyer or tenant for viable use." [May Tr. 23:21-24:1]. Ms. Johnson's flawed interpretation of the COA process, and the HCB's reliance on the same, ultimately led to an erroneous and unlawful Decision.

What the CMC actually states is that, in evaluating economic hardship, the HCB "*may consider*" "any listing of property for sale or rent, price asked, and any offers received, if any[.]" CMC 1435-09-2(b)(iii)(bb). Ms. Johnson's interpretation of this subsection to *require* a property owner to sell or lease its property defies the plain reading of the section. Contrary to Ms. Johnson's misrepresentation, a property owner is *not* required to sell its property to demonstrate economic hardship. That would not only be absurd, but such a requirement would amount to an unconstitutional taking. Instead, the consideration of any previous listing of the property is only a nonessential, discretionary subfactor of the economic hardship analysis that the HCB "*may consider*." (Emphasis added.) *See* Section 1435-09-2(b)(iii). It is not required.

Indeed, no government can require a property owner to sell its property to avoid economic hardship. To do so here would defeat the purpose for which the Property Owner purchased the property. Such a standard would lead to an absurd analysis as each successive property owner could never establish economic hardship because they would simply be forced to sell their property. To the contrary, the CMC subsection simply permits the HCB to *consider* listings of property for sale or rent because presumably recent arms-length sales are the best evidence of market value for the property.



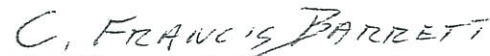
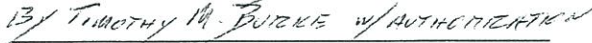
Notwithstanding the misstatement of the law, the consideration of whether the Property Owner offered the property for sale is not determinative of whether a property owner demonstrated by credible evidence that it would suffer economic hardship. It is simply another nonessential, discretionary *subfactor* in the economic hardship analysis that the HCB “may consider.” To that end, the HCB heard testimony and was presented with evidence regarding the previous sale of the Dennison in 2013. Conversely, there was no credible evidence in the Record of a ready, willing, and able buyer to purchase the Dennison from the Property Owner. The Property Owner did not list the property for sale because it consulted eight experts, all of whom confirmed that the reuse of the property is not economically feasible; therefore, the Property Owner was entitled to a COA to demolish the Dennison.

The HCB’s substantial reliance on this nonessential, discretionary *subfactor* to deny the COA is similarly erroneous. To be clear, neither the HCB, nor the City, has any legal authority whatsoever to force a sale of the property, as it effectively attempts to do in this case. Therefore, the HCB erred in denying the application based on the fact that the Property Owner has not offered the property for sale. The Decision must be reversed.


## VI. CONCLUSION

The HCB ultimately denied the Property Owner’s request for a COA by the slimmest of margins – a plurality 3-2 vote instead of a majority vote of the seven-member HCB – based on an incorrect legal standard of review, misinterpretation of law, and consideration of inaccurate “facts.” Despite these legal infirmities, only three members of the seven-member HCB voted to deny the Property Owner’s request for a COA. The ZBA should reverse the HCB’s plurality decision because the Property Owner inarguably met the standard established by CMC 1435-09-2. The Property Owner demonstrated by credible evidence that its proposal to demolish the blighted Dennison conforms to the Main Street Historic District Guidelines, and that it will suffer economic hardship if the COA is not approved. Accordingly, the HCB’s decision should be reversed.

Respectfully submitted,

  
BY  W/AUTHORIZATION

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**CERTIFICATE OF FILING AND SERVICE**

It is hereby certified that the foregoing Brief of Appellant Columbia REI, LLC has been filed with the Zoning Board of Appeals of the City of Cincinnati, 805 Central Avenue, Suite 500, Cincinnati, Ohio 45202, by hand delivery this 14<sup>th</sup> day of September, 2016, and a copy thereof has been served upon Sean S. Suder, Attorney for Cincinnati Preservation Association and Cincinnati Preservation Collective, c/o Graydon Head & Richey, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202, by hand delivery, this 14<sup>th</sup> day of September 2016.

  
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# Exhibit A

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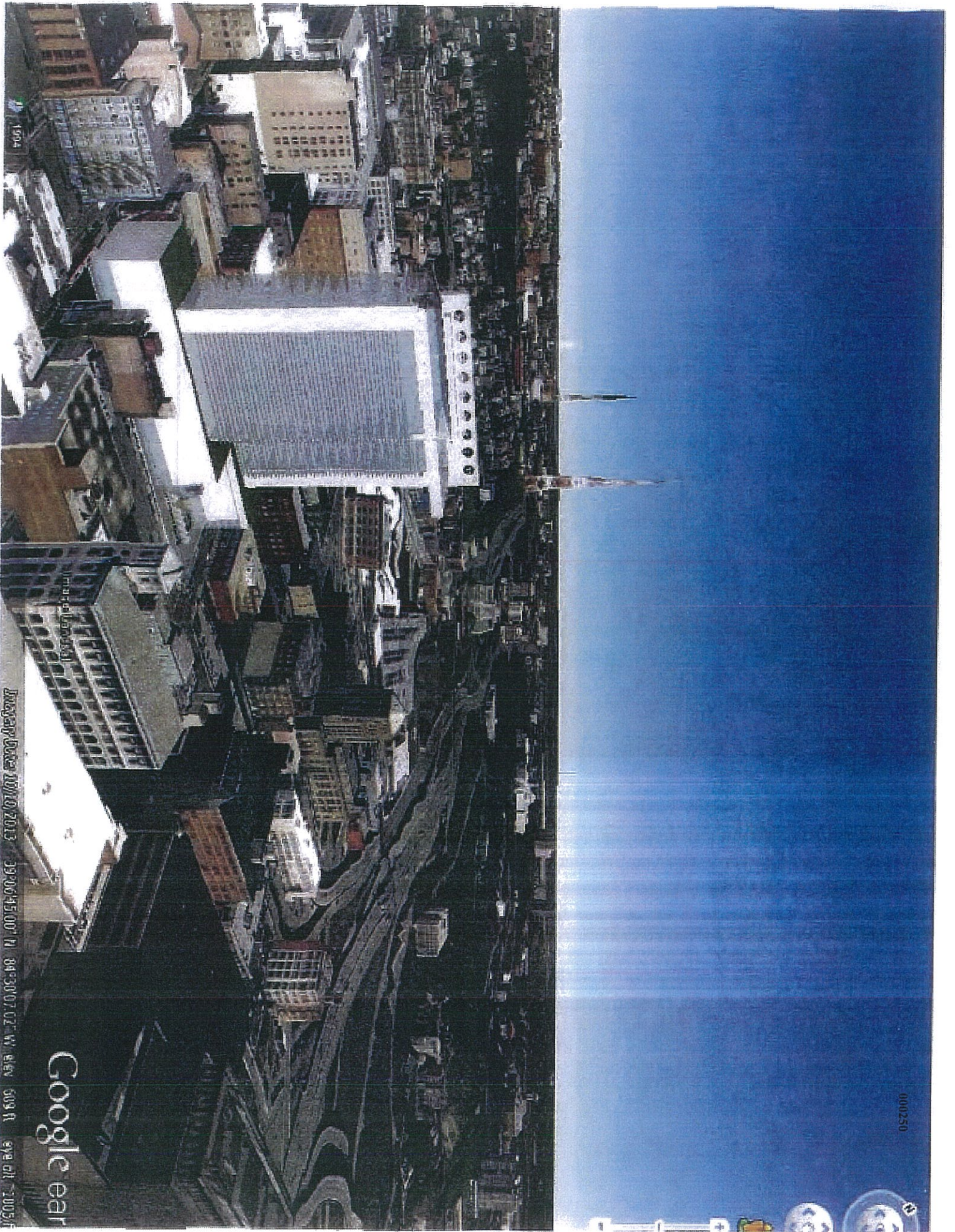
10000 L. art1341

Google

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Imagery Date: 10/10/2013 39°06'26.22"N 84°30'48.92"W elev: 677 ft eye alt: 677 ft





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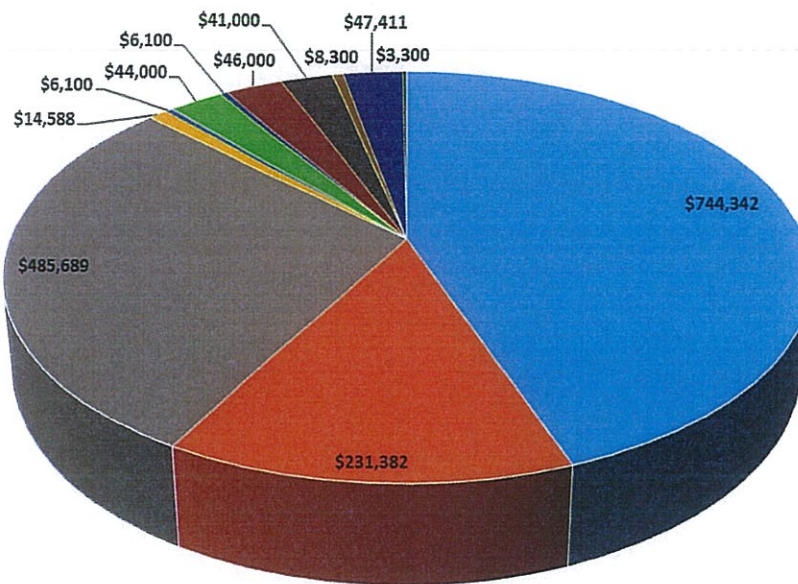
Google Earth

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## EXHIBIT B

### Acquisition and Carrying Costs \$1,728, 212

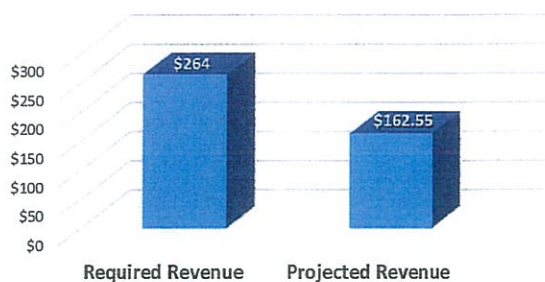


- Building Price on Ironworks Books [May Tr: 41:10-15].
- Construction, development and operating cost [May Tr: 41:17-20].
- Additional monies paid to 3CDC to cover costs [May Tr: 41:21-25].
- 2013 Maintenance and insurance costs [May Tr: 41:17]
- 2013 Boiler and maintenance [May Tr: 47:12-23].
- 2014 Insurance [May Tr: 48:15-17].
- Real Estate Taxes x 2 (May Tr: 48:18).
- 2015 Legal and Utilities [May Tr: 48:24].
- 2015 Maintenance [May Tr: 48:25].
- Removal of unusable mattresses and furniture [May Tr: 49:7-8].
- 2013 Utility Expenses [May Tr: 47:20-21].

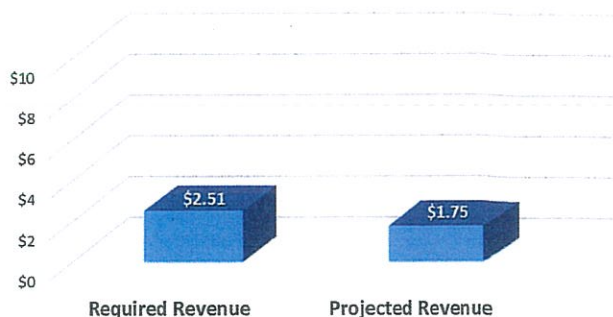


## EXHIBIT B

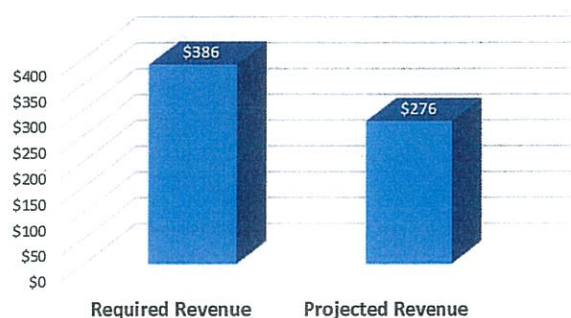
**Boutique Hotel Hurdle Average Daily Rates**



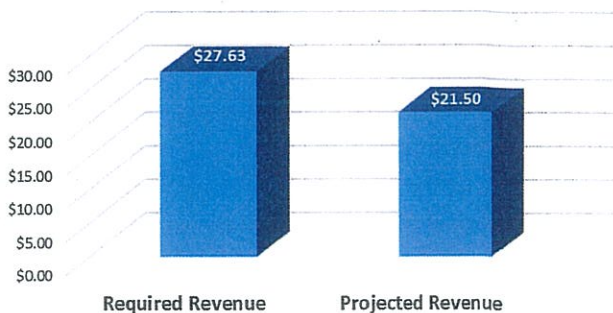
**Apartment Rent Revenues per Sq. Ft.**



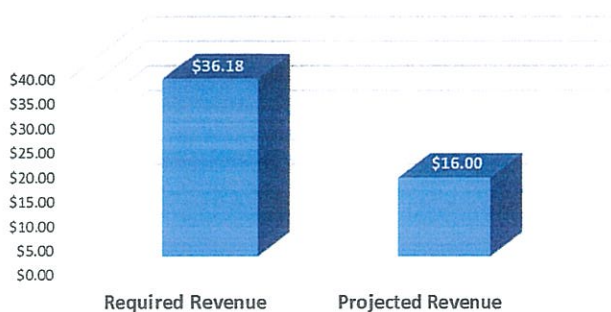
**Condominium Revenues per Sq. Ft.**



**Market Office Space per Sq. Ft.**



**1st Floor Commercial Space per Sq. Ft.**



**Required Revenue vs. Expected Revenue**

	Required Revenue vs. Expected Revenue	Required Revenue	Projected Revenue
<b>Boutique Hotel</b>	\$264 hurdle average daily rate required; \$162 expected (Beck February 19, 2016 Report, pg. 20).	\$264	\$162.00
<b>Apartments</b>	\$2.51 rent per sq. foot required; \$1.75 expected (Beck February 19, 2016 Report, pg. 23).	\$2.51	\$1.75
<b>Condominiums</b>	\$386 per sq. foot required; \$276 per sq. foot expected (Beck, February 19, 2016 Report, pg. 25).	\$386.00	\$276.00
<b>Market Office Space</b>	\$27.63 net operating income per sq. foot required; \$21.50 expected (Beck February 19, 2016 Report, pg 27).	\$27.63	\$21.50
<b>1st Floor Retail</b>	\$36.18 net operating income per sq. foot required; \$16.00 expected (Beck February 19, 2016 Report, pg 28).	\$36.18	\$16.00



## EXHIBIT B

### APPENDIX TO EXHIBIT B

#### Breakdown of each Dennison Renovation Option's Feasibility Below:

##### 1. Boutique Hotel Total Cost: \$12,477,959

Cost to renovate HGC Construction estimate	\$9,445,509
Additional Cost for Restaurant	\$1,000,000
Total Renovation Cost	\$10,445,509
Land-Auditor's Value	\$404,890
<b>Total Cost Including Land Before Incentive</b>	<b>\$10,850,399</b>
Entrepreneurial Incentive	15% \$1,627,560
<b>Total Cost</b>	<b>\$12,477,959</b>
Total Guest Rooms	60
Cost per Room	\$207,966
Capitalization rate	8.00%
Annual NOI	\$16,637
Expense Ratio	75%
Expenses	\$49,911
RevPar	\$66,548
Occupancy	68%
Hurdle ADR	\$268
Deduction for Restaurant Rental	(4.16)
ADR:	\$264
<b>\$264 hurdle average daily rate required; \$162 expected, Beck February 19, 2016 Report, pg. 20.</b>	



## EXHIBIT B

### 2. Market Level Apartments Total Cost: \$9,599,059

Cost to renovate HGC Construction estimate	\$7,942,118
County Auditor's Land Value	\$404,890
<b>Total Before Incentive</b>	<b>\$8,347,008</b>
Entrepreneurial Incentive	15% \$1,252,051
<b>Total Cost to Develop</b>	<b>\$9,599,059</b>
Total Units	52
Cost per unit	\$184,597
Capitalization rate	5.50%
Annual NOI	\$10,153
Expense Ratio	35%
Expenses	\$5,576
Annual Rent	\$15,729
Stabilized Vacancy	6%
Annual PGI	\$16,733
Commercial Space Size	1,604
Commercial Rent	\$15.00
Annual PGI from Commercial Space	\$24,060
Allocated Commercial Space PGI Per Unit	\$ (463)
Required Annual Feasible Rent per Unit	\$16,270
Monthly Rent	\$1,356
Average unit Size	540
Minimum Monthly Feasible Rent per Square Foot	\$2.51
<b>\$2.51 rent per sq. foot required; \$1.75 expected, Beck February 19, 2016 Report, pg. 23.</b>	

<b>Expenses</b>	
Wages, Taxes and Benefits	\$1,200
Repairs and Maintenance	\$1,500
Turnover	\$250
Utilities	\$1,000
Advertising and Marketing	\$100
Insurance	\$250
Real Estate Taxes (Land Only)	\$240
Management	\$786
Reserves	\$250
Total Expenses	\$5,576



## EXHIBIT B

### 3. Market Condominiums: \$10,455,961

Commercial Space Size	1,604
Commercial Space Rent	\$15.00
Annual PGI from Commercial Space	\$24,060
GIM for Commercial Space	11.10
Value of commercial space	\$267,066
Total Units	35
<b>Contributory value per unit</b>	<b>\$7,630</b>

Cost to renovate HGC Construction	\$8,687,250
County Auditor's Land Value	\$404,890
<b>Total Before Incentive</b>	<b>\$9,092,140</b>
Entrepreneurial Incentive	15% \$1,363,821
<b>Total Cost</b>	<b>\$10,455,961</b>
Total Units	35
Cost per Unit	\$298,742
Contributory value of Commercial Unit	\$ (7,630)
Net Cost of Condo Unit	\$291,112
Sale Commission	6% \$18,582
Sale Price including commission	\$309,694
Average Net Unit Size	802

**\$386/sq. foot required; \$276/ sq. foot expected, Beck, February 19, 2016 Report, pg. 25.**



## EXHIBIT B

### 4. Market Office Space: \$7,465,529

Annual Expenses/sq. foot	
Management	\$1.47
Insurance	\$0.20
Repairs	\$1.50
Cleaning/Janitorial	\$1.50
Utilities	\$2.00
Real Estate Taxes	\$0.32
Administrative	\$0.75
Security	\$0.20
Reserves	\$0.25
<b>Total Expenses</b>	<b>\$8.19 per square foot</b>

Cost to renovate HGC Construction	\$5,000,000
County Auditor's Land Value	\$404,890
Commissions	\$307,054
Tenant Improvements	\$779,820
<b>Total before Incentive</b>	<b>\$6,491,764</b>
Entrepreneurial Incentive	15% \$973,765
<b>Total Cost</b>	<b>\$7,465,529</b>
Total Size	38,991
Cost Per square foot	\$191
Capitalization rate	8.50%
Annual NOI	\$16.24
Expenses (per square foot)	\$8.19
Annual Rent	\$24.43
Stabilized Vacancy	\$17.00%
Annual PGI	\$29.43
Commercial Space Size (estimated)	4,800
Commercial Space Rent	\$15.00
Annual PGI from Commercial Space	\$72,000
Allocated Commercial Space Per square foot	\$ (1.85)

**\$27.63 net operating income per sq. foot required; \$21.50 expected; Beck February 19, 2016 Report, pg. 27.**



## EXHIBIT B

### 5. First-Floor Commercial Space: \$2,132,956

Cost to renovate HGC Construction	\$1,449,854
County Auditor's Land Value	\$404,890
<b>Total before Incentive</b>	<b>\$1,854,744</b>
Entrepreneurial Incentive	15% \$278,212
<b>Total Cost</b>	<b>\$2,132,956</b>
Total Size	5,300
Cost Per square foot	\$402
Capitalization rate	9.00%
<b>\$36.18 net operating income per sq. foot required; \$16.00 expected; Beck February 19, 2016 Report, pg. 28.</b>	

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